



JUDICIAL INVESTIGATION COMMISSION

City Center East - Suite 1200 A
4700 MacCorkle Ave., SE
Charleston, West Virginia 25304
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December 18, 2015

Re: JIC Advisory Opinion 2015-24.

Dear

Your recent request for an advisory opinion was reviewed by the Judicial Investigation Commission. The factual scenario giving rise to your request is as follows: You were recently appointed to serve as a Family Court Judge in _____ County. Before that, you worked as a law clerk to the Honorable _____ Judge of the Judicial Circuit. As part of your duties for _____, you worked on appeals from Family Court – often preparing the orders of the Circuit Court. You now have a case pending before you where you had previously drafted an appellate order for Judge _____.

You have no specific recollection of the facts of the case. You want to know whether you can preside over the matter as Family Court Judge or whether you should disqualify yourself from all such cases that were pending on appeal during the time you were a law clerk.

To address the questions which you have raised the Commission has reviewed Rule 2.11(A)(5)(b) of the Code of Judicial Conduct. The Rule provides in pertinent part:

- (A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:
 - (5) The judge: . . . (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the

proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy.

When a question of disqualification based on a relationship develops an analysis must be made of when that relationship rises to a level causing a reasonable question about a judge's impartiality. In *State ex rel. Brown v. Dietrick*, 191 W. Va. 169, 444 S.E.2d 47 (1994), the Supreme Court of Appeals of West Virginia considered whether the circuit court was correct in holding that a search warrant issued by a magistrate was void because the magistrate was married to the Chief of Police and one of his officers had obtained the warrant. The Court held that in any criminal matter where the magistrate's spouse was involved the magistrate would be disqualified from hearing that matter. The Court declined to extend a *per se rule* to other members of the police force. The fact that the magistrate's spouse was the chief of police of a small agency did not automatically disqualify the magistrate who could be otherwise neutral and detached from issuing a warrant sought by another member of the police force.

In *Tennant v. Marion Health Care Foundation*, 194 W. Va. 97, 459 S.E.2d 374 (1995), the Court held that a judge should disqualify himself or herself from any proceeding in which his impartiality might reasonably be questioned. The Court noted that the avoidance of the appearance of impropriety is as important in developing public confidence in the judicial system as avoiding impropriety and that the judge should take appropriate action to withdraw from a case in which the judge deems himself or herself biased or prejudiced. *Tennant* cited the commentary to former Canon 3E(1) which states that a judge should timely disclose on the record information which he/she believes the parties or their lawyers might consider relevant to the question of disqualification. Litigants and counsel should be able to rely on judges complying with the Code of Judicial Conduct. There is no obligation imposed on counsel to investigate the facts known by the judge which could possibly disqualify the judge. The judge has a duty to disclose any facts even if the judge does not feel that they are grounds for disqualification *sua sponte*.

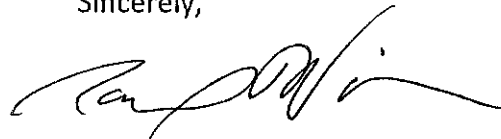
Tennant also addressed the rule that a judge has an equally strong duty to sit where there is no valid reason for recusal. In so doing, the Court set forth a balancing test between the two concepts. While giving consideration to the administration of justice and the avoidance of the appearance of unfairness, a judge must also consider whether cases may be unfairly prejudiced or delayed or discontent may be created through unfounded charges of prejudice or unfairness made against the judge. The

Court noted that the standard for recusal is an objective one. Facts should be viewed as they appear to the well-informed, thoughtful and objective observer rather than the hypersensitive, cynical and scrupulous person.

In applying the foregoing to your factual scenario, the Commission is of the opinion that you do not have to disqualify yourself from presiding over every case in which you formerly served as a law clerk. You are required to disqualify yourself only in those cases in which you had a personal and substantial involvement. However, you must disclose your prior involvement; and if there is an objection to your presiding over the case, you must then take the appropriate steps pursuant to West Virginia Trial Court Rules 17.01, *et seq.*

It is hoped that this opinion fully addresses the issues which you have raised. If there is any further question regarding this matter do not hesitate to contact the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "Ronald E. Wilson", written in a cursive style.

Ronald E. Wilson, Chairperson
Judicial Investigation Commission

REW/tat